Dollar Valley (M) Sdn Bhd v Rimba Raya Sdn Bhd & Ors

HIGH COURT (IPOH) — LABOUR APPEAL NO 16–13 OF 2001
BALIA YUSOF JC
26 JUNE 2004

Civil Procedure — Appeal — Notice of appeal — Appeal against decision of Senior Inspector of Mines — Whether proper parties named — Whether notice of appeal rendered defective — Whether a mere technicality which is curable — Mining Enactment (FMS Cap 147) s 107, Subordinate Courts Rules 1980 O 49 r 6 and Rules of the High Court 1980 O 1A, 2 r 1

The appellant was the holder of a mining license ('the said license'). During the subsistence of the said license, the senior inspector of mines ('SIM') cancelled the license and informed the appellant to cease mining operations as the relevant mining land had been allocated for a mixed development project by the State Government. Subsequently, the SIM informed the appellant that the wrong mining license number had been cited. Based on this fact, the appellant filed this appeal against the decision of the SIM in cancelling the license.

In the notice of appeal, the appellant had named Rimba Raya Sdn Bhd as a first respondent, Pengarah Tanah dan Galian, Perak as the second respondent and the Kerajaan Negeri Perak as the third respondent. Before its hearing, the first respondent was dropped from being a party to the appeal. At the outset of the appeal, counsel for second and third respondent raised the following preliminary objections: (a) whether proper procedure was followed in filing of the appeal; (b) whether there was a proper notice of appeal after a wrong party had been cited in the notice of appeal; and (c) whether the defective notice of appeal was curable under O 2 r 1 and O 1A of the Rules of the High Court 1980 ('the RHC').

Held, upholding the preliminary objections and dismissing the appeal:

(1) An appeal against the decision of the SIM must be brought in the same way as a civil appeal from a sessions court or magistrates court in accordance with the procedure laid down in the Subordinate Court Rules 1980 and the Rules of the High Court 1980. The appellant in this appeal was competent to lodge this appeal and had adopted the right approach and mode of bringing this appeal to the court (see para 4); *Lee Soo Chuan v Lai Ah Yan & Anor* [1972] 2 MLJ 33 followed.

(2) Both the second and third respondents were not parties directly affected by the appeal. The requirement of O 49 r 6 of the Subordinate Courts Rules 1980 stipulates that the notice of appeal must be served by the appellant on all parties directly affected by the appeal. The SIM would be directly affected by the appeal as it was his decision that was being appealed against. Therefore, he should have been named as a party in this appeal and be served with the notice of appeal. As this was not done, the appeal had therefore not been properly brought before the court and could not be proceeded with (see para 6).

(3) Fundamental breaches of the rules could never be treated as a mere irregularity or technical non-compliance. The defect in the notice of appeal in the instant case by bringing wrong party to the court was not something which could be cured under both the provisions of O 1A and O 2 r 1 of the RHC (see para 7); *Asia Commercial Finance (M) Berhad v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 referred.

[**Bahasa Malaysia summary**

Perayu adalah pemegang suatu lesen perlombongan ('lesen tersebut'). Semasa tempoh kesahan lesen tersebut, inspektor kanan perlombongan ('IKP') telah membatalkan lesen tersebut dan memaklumkan kepada perayu untuk menamatkan operasi perlombongan tersebut kerana tanah perlombongan tersebut telah diperuntukkan untuk projek pembangunan campuran oleh Kerajaan Negeri. Berikutan itu, IKP telah memaklumkan kepada perayu bahawa nombor lesen perlombongan yang salah telah diberikan. Berdasarkan fakta ini, perayu telah memfailkan rayuan ini terhadap keputusan IKP dalam pembatalan lesen tersebut.

Dalam notis rayuan, perayu telah menamakan Rimba Raya Sdn Bhd sebagai responden pertama, Pengarah Tanah dan Galian, Perak sebagai responden kedua dan Kerajaan Negeri Perak sebagai responden ketiga. Sebelum tarikh perbicaraan, responden pertama telah digugurkan sebagai satu pihak kepada rayuan tersebut. Pada permulaan rayuan tersebut, peguam bagi pihak responden kedua dan ketiga telah menimbulkan bantahan-bantahan awal berikut: (a) sama ada prosedur yang sesuai telah diikuti dalam pemfailan rayuan tersebut; (b) sama ada terdapat notis rayuan yang sewajarnya selepas pihak yang salah telah dinamakan dalam notis rayuan; dan (c) sama ada notis rayuan yang cacat dapat diperbaiki di bawah A 2 k 1 dan A 1A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, mengekalkan bantahan-bantahan awal dan menolak rayuan:

(1) Satu rayuan terhadap keputusan IKP hendaklah dimulakan dengan cara yang sama seperti satu rayuan sivil dari mahkamah sesyen atau mahkamah majistret menurut prosedur-prosedur yang diperuntukkan di bawah Kaedah-Kaedah Mahkamah Rendah 1980 dan Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu dalam kes ini layak untuk membuat rayuan ini dan telah menerimapakai pendekatan dan cara yang betul dalam membawa rayuan ini kepada mahkamah (lihat perenggan 4); *Lee Soo Chuan v Lai Ah Yan & Anor* [1972] 2 MLJ 33 diikut.

(2) Kedua-dua responden kedua dan ketiga bukan pihak-pihak yang terjejas secara langsung oleh rayuan ini. Keperluan A 49 k 6 Kaedah-Kaedah Mahkamah Rendah 1980 memperuntukkan bahawa notis rayuan hendaklah disampaikan oleh perayu ke atas semua pihak yang terjejas secara langsung oleh rayuan. Inspektor Kanan Perlombongan adalah pihak yang terjejas secara langsung oleh rayuan ini memandangkan rayuan ini adalah berdasarkan keputusannya. Oleh itu, beliau sepatutnya dinamakan sebagai pihak kepada rayuan ini dan diserahkan dengan notis rayuan.

Memandangkan ini tidak dilakukan maka rayuan ini tidak dimulakan secara teratur di mahkamah ini dan tidak boleh diteruskan (lihat perenggan 6).

(3) Perlanggaran kaedah-kaedah asas tidak seharusnya dianggap semata-mata salah aturan atau ketidakpatuhan teknikal. Kecacatan dalam notis rayuan dalam kes semasa dengan menamakan pihak-pihak yang salah bukan sesuatu yang dapat diperbaiki menerusi peruntukan di bawah kedua-dua A 1A dan A 2 k 1 KMT (lihat perenggan 7); *Asia Commercial Finance (M) Berhad v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 dirujuk.]

Notes

For cases on notice of appeals, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1095–1100.

Cases referred to

Asia Commercial Finance (M) Berhad v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)
Himat Iktisas (M) Sdn Bhd v Better Sleep Marketing (East Coast) Sdn Bhd [2002] 1 MLJ 577 (refd)
Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)
Lee Soo Chuan v Lai Ah Yan & Anor [1972] 2 MLJ 33 (folld)
SA Andavan v Registrar of Titles, Negeri Sembilan [1997] 2 MLJ 220 (refd)

Legislation referred to

Mining Enactment (FMS Cap 147) s 107
Rules of the High Court 1980 O 1A, O 2 r 1
Subordinate Courts Rules 1980 O 49 r 6

Gary Leuk Sing Yee (Leuk & Partners) for the appellant.
Mohd Jazamuddin bin Hj Ahmad Nawawi SFC for the second and third respondents.

Balia Yusof JC:

[1] On 2 October 2001, the appellant filed an appeal against the decision of the Merinyu Kanan Galian Negeri Perak Darul Ridzuan made on 4 September 2001. The said appeal was filed in accordance with the provisions of s 107 of the Mining Enactment (FMS Cap 147) which allows any party aggrieved by any decree, order or decision made or given by a Senior Inspector of Mines to appeal within 30 days from the date of the decree, order or decision.

[2] The notice of appeal filed by the appellant has cited three parties as the respondent namely, Rimba Raya Sdn Bhd, the Pengarah Tanah dan Galian, Perak and the Kerajaan Negeri Perak. The appeal is against the decision of the Senior Inspector of Mines cancelling the licence of the appellant. At the early stage of the hearing of the matter, the first respondent, Rimba Raya Sdn Bhd was taken out leaving behind only the Pengarah Tanah dan Galian Perak and Kerajaan Negeri Perak as the respondents in this appeal.

[3] Briefly, the facts of the case states that the appellant was issued with a Lesen Perlombongan Hidraulik Bil KR 2/2001 on 6 August 2001 with a validity period from 3 July 2001 to 2 July 2002. By a letter dated 27 August 2001, the appellant was informed by the Senior Inspector of Mines that the said land has been allocated for a mixed development project by the State Government and the licence issued to the appellant earlier was cancelled. The appellant was told to cease mining operation in the area and was further informed that an appeal could be forwarded to the State Government over the matter. By another letter dated 4 September 2001 the appellant was informed by the Senior Inspector of Mines that there occurs an error in the earlier letter dated 27 August 2001 in respect of the reference to the licence which should refer to Lesen Hidraulik KR 6/2001 instead by Lesen Hidraulik KR 6/200. It was in consequence of this letter that the appellant filed the notice of appeal to the High Court appealing against the decision of the Senior Inspector of Mines cancelling the said licence. After filing the notice of appeal, the appellant filed a Rekod Rayuan in Lampiran 8. At the hearing of the appeal, a preliminary objection was raised by the learned Senior Federal Counsel contending that the second and third respondents should not be named as the respondents in the appeal and that the proper party to be the respondent should be the Senior Inspector of Mines, for it is the decision of the Senior Inspector of Mines that is being appealed against.

[4] In the course of hearing the submissions of both counsels for the appellant and the respondent, an issue as to the mode of bringing this appeal before the High Court was also argued and reference was made to the case of *Lee Soo Chuan v Lai Ah Yan & Anor* [1972] 2 MLJ 33 as an authority for the proposition than an appeal against the decision of the Senior Inspector of Mines must be brought in the same way as a civil appeal from a sessions court or magistrates court in accordance with the procedure laid down in the Subordinate Court Rules 1980 and the Rules of the High Court 1980. I am certainly bound the said decision of the Federal Court and rule that the appellant is competent to lodge this appeal and has adopted the right approach and mode of bringing this appeal to this court by filing the notice of appeal and the subsequent documents following it. The issue raised in the preliminary objection by the second and third respondents is whether there is a valid and proper notice of appeal after taking in to consideration that a wrong party has been cited in the notice of appeal.

[5] It is trite that an appeal does not exist without the filing of a notice of appeal and that the same be served on the relevant parties. The issue before this court now is whether the notice of appeal filed by the appellant in the present case is a good notice. On a defective notice of appeal, the Supreme Court in the case of *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 held that the notice of appeal which need to be filed and served under O 49 of the Subordinate Courts Rules 1980 must be indorsed with the date of filing of the said notice by the court whose decision is appealed from. Without it, such notice is defective and not a good notice and does not bring an appeal into existence. Following the same principle, Suriyadi J in *Himat Iktisas (M) Sdn Bhd v Better Sleep Marketing (East Coast) Sdn Bhd* [2002] 1 MLJ 577 at pp 582–583 said:

To reiterate, the reason for my agreeing with the preliminary objection followed by the objection of the impugned notice of appeal was not because it was served out of time, but on the premise of the failure of the defendant to serve the plaintiff with a good notice of appeal. Even though the plaintiff had been supplied with a copy of the notice of appeal, the fact that it had not emanated from the court, a good notice of appeal could not have been said to have been served (*Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153. That being so no service had taken place.

[6] In the instant case the notice of appeal filed by the appellant has named three parties namely Rimba Raya Sdn Bhd, Pengarah Tanah dan Galian, Perak and the Kerajaan Negeri Perak. In so far as the first respondent was concerned an application was filed on their behalf *via* encl 16 to strike out the appeal. This application was however withdrawn upon the appellant agreeing to drop the first respondent from being a party to this appeal and such order was made before the registrar on 9 April 2003. The first respondent was dropped on the basis that the parties agreed that the first respondent is not the proper party in this appeal. It is now the second and third respondents' turn to say the same. Having considered the facts and circumstances of the case, it is clear that both the second and third respondents are not parties directly affected by the appeal. The requirement of O 49 r 6 of the Subordinate Courts Rules 1980 stipulates that the notice of appeal shall be served by the appellant on all parties directly affected by the appeal. In my view, it is the Senior Inspector of Mines that will be directly affected by the appeal and it is his decision that is being appealed against. He ought to be named as a party in this appeal and be served with the notice of appeal. This has not been done and the appeal has therefore not been properly brought before the court and cannot be proceeded with. For an appeal to be brought before the court, it is essential that a proper and valid notice of appeal to be filed and served on the relevant affected party. This has not been complied with by the appellant. It is not known how the second and third respondents are roped-in to the appeal and they are not the relevant parties.

[7] This court has been urged by the learned counsel for the appellant to treat the defect in the notice as a procedural technicality and that the appeal should be heard on its merits. While I may agree with the proposition that rules of procedure should be the handmaiden not the master, fundamental breaches of the rules can never be treated as a mere irregularity (see *Asia Commercial Finance (M) Berhad v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283). Such irregularity which results in the wrong party being brought to court and the relevant affected party being deprived of the right to be heard is in my view not a mere procedural technicality. It is a fundamental breach of the basic process of bringing about an appeal to this court. Ajaib Singh J (as he then was) in *SA Andavan v Registrar of Titles, Negeri Sembilan & Ors* [1997] 2 MLJ 220 at p 225 observed:

Litigation is governed by rules of procedure and no side may take advantage over another by side stepping any rule and it is the duty of the court to ensure that the parties engaged themselves in a fair contest.

[8] The defect in the notice of appeal in the instant case is not something which can be cured under the provisions of O 2 r 1 of the Rules of the High

Court 1980 and I am also mindful of the provisions of O 1A of the same in holding that the defect in the notice of appeal in the instant case is not a mere technical non-compliance.

[9] For the reasons aforesaid, I uphold the preliminary objection by the second and third respondents and rule that the notice of appeal is flawed and the appeal has not been properly brought before this court. The appeal is hereby dismissed.

Preliminary objections upheld and appeal dismissed.

Reported by Sugandra Rao